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No. 95-1906

Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

VERNON WATTS,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,

v.

CHERYL PUTRA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT WATTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a court sentencing a defendant for the offense of conviction may consider conduct underlying a charge of which the defendant was acquitted.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
JURISDICTION	1
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE AND FACTS	2
REASONS FOR DENYING THE PETITION.....	3
A. Certiorari Should Not Be Granted to Resolve an Issue Which Is Within the Jurisdiction of the United States Sentencing Commission to Resolve, and Which Is Currently Under Review by the Sentencing Commission	3
B. There Is a Split in Circuit Court Authority on the Acquitted Conduct Issue.....	7
C. A Grant of Certiorari in This Case Would Have Constitutional Implications Beyond Those Suggested by the Government.....	9
D. The Present Case Is an Awkward and Inappropriate Vehicle for Resolution of the Acquitted Conduct Issue.....	14
CONCLUSION	15
APPENDIX A	A1
APPENDIX B.....	B1

TABLE OF AUTHORITIES

	Page
CASES	
<i>Arizona v. Rumsey</i> , 467 U.S. 203 (1984).....	10
<i>Ashe v. Swenson</i> , 397 U.S. 436 (1970)	11
<i>Bailey v. United States</i> , 116 S.Ct. 501 (1995)	14
<i>Braxton v. United States</i> , 500 U.S. 344 (1991)	4, 6
<i>Bullington v. Missouri</i> , 451 U.S. 430 (1981)	10
<i>Darden v. Wainwright</i> , 447 U.S. 168 (1986)	10
<i>Duncan v. Louisiana</i> , 391 U.S. 145 (1968).....	13
<i>Green v. United States</i> , 355 U.S. 184 (1957).....	9
<i>McMillan v. Pennsylvania</i> , 477 U.S. 79 (1986).....	13
<i>United States v. Boney</i> , 977 F.2d 624 (D.C. Cir. 1992)	8
<i>United States v. Brady</i> , 928 F.2d 844 (9th Cir. 1991) ...	4, 8
<i>United States v. Diaz-Rosas</i> , 13 F.3d 1305 (9th Cir.), cert. denied, 114 S.Ct. 1848 (1994).....	11
<i>United States v. Halper</i> , 490 U.S. 435 (1989)	9
<i>United States v. Lanoue</i> , 71 F.3d 966 (1st Cir. 1995)	8
<i>United States v. Lombard</i> , 72 F.3d 170 (1st Cir. 1995)	12
<i>United States v. Perez</i> , 858 F.2d 1272 (7th Cir. 1988)	8
<i>United States v. Putra</i> , 78 F.3d 1386 (9th Cir. 1996)	8
<i>United States v. Rodriguez-Gonzalez</i> , 899 F.2d 180-182 (2d Cir.), cert. denied, 498 U.S. 844 (1990)	8
<i>United States v. Torres-Rodriguez</i> , 930 F.2d 1375 (9th Cir. 1991)	14
<i>United States v. Tucker</i> , 404 U.S. 443 (1972).....	12

TABLE OF AUTHORITIES – Continued

	Page
<i>United States v. Vgeri</i> , 51 F.3d 876 (9th Cir. 1995)	11
<i>Williams v. New York</i> , 337 U.S. 241 (1949).....	10
<i>Witte v. United States</i> , 515 U.S. ___, 132 L.Ed.2d 351, 115 S.Ct. 2199 (1995).....	10, 11
STATUTES AND REGULATIONS	
18 U.S.C. 924(c)	2, 14
21 U.S.C. 841(a)(1).....	2
28 U.S.C. 1254(1)	1
California Penal Code	
§ 851.8(e).....	12
Sentencing Guidelines:	
§ 1B1.3.....	3
§ 2D1.1(b)(1)	2, 14
§ 3D1.2(d).....	3
OTHER	
United States Constitution	
Fifth Amendment.....	2, 13
Sixth Amendment	2

RESPONDENT WATTS' BRIEF IN OPPOSITION

Respondent Watts requests that this Court deny the Government's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. The opinion of the Court of Appeals appears at 67 F.3d 790 and at Appendix A to the Petition for Writ of Certiorari.

Certiorari should be denied because the issue posed is one which should be addressed in the first instance administratively by the United States Sentencing Commission. The Sentencing Commission is currently considering proposed Guideline amendments to address the use of acquitted conduct in sentencing proceedings. The Government suggests that there is an underlying constitutional issue which merits review by this Court. Even conceding that a constitutional issue is presented, any such issue would involve more provisions of the Constitution than suggested by the Government, and would have a different result than that proposed by the Government. Finally, this is not an appropriate case for certiorari review because the jury instructions defining firearm use, on which Mr. Watts was tried and acquitted, have been disapproved by a recent decision of this Court. Any decision by this Court based on the disapproved jury instructions would be confusing and unhelpful to courts in future prosecutions under newer jury instructions.

 JURISDICTION

The Government invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the provisions cited by the Government, Respondent Watts relies on the Fifth and Sixth Amendments to the United States Constitution, and 18 U.S.C. 924(c), which are reproduced in the Appendix to this Brief in Opposition.

STATEMENT OF THE CASE AND FACTS

Respondent Watts was convicted of possessing cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and acquitted of using or carrying a firearm during a drug trafficking offense, in violation of 18 U.S.C. 924(c). Despite the acquittal on the firearm charge, his prison sentence was enhanced under Guideline Section 2D1.1(b)(1), for possession of a dangerous weapon.

On appeal it was held that the sentencing court in imposing a sentence enhancement for possession of a dangerous weapon relied upon facts which were necessarily rejected by the jury's acquittal, that such an enhancement would violate a Ninth Circuit rule against such use of acquitted conduct, and that a remand for resentencing was necessary.

At trial evidence was presented that a house was searched by narcotics agents who had been following Mr. Watts at the direction of his probation officer. The house was occupied by Mr. Watts' girlfriend Sonja Lee. Officers found crack cocaine in the kitchen cabinet of the house.

R.T. 92.¹ In a closet of the master bedroom the officers found a .380 semi-automatic pistol and a .22 caliber rifle. R.T. 96. Mr. Watts was arrested in another part of town, but he was found to have a garage door opener and the keys to Ms. Lee's house on his person, and some documents addressed to him were found in the house. R.T. 100-107. In an interrogation at the time of the arrest, Mr. Watts stated that the drugs and guns in the house belonged to him. R.T. 242.

Ms. Lee testified that the guns found in the closet were given to her after her great-grandfather's death a couple of years earlier. R.T. 336.

REASONS FOR DENYING THE PETITION

A. Certiorari Should Not Be Granted to Resolve an Issue Which Is Within the Jurisdiction of the United States Sentencing Commission to Resolve, and Which Is Currently Under Review by the Sentencing Commission.

The Government points to a split in authority among the circuits of the United States Courts of Appeals on the issue of whether acquitted conduct may be the source of a sentence enhancement under the United States Sentencing Guidelines. Pet. 8-9. The Guidelines are not clear on this question. Application Note 3 of the Commentary to Guideline 1B1.3, "Relevant Conduct," refers to offenses "for which grouping of counts would be required under § 3D1.2(d) had the defendant been convicted of multiple

¹ Citations are to the record before the Court of Appeals.

counts." According to the Commentary, "Application of this provision does not require the defendant, in fact, to have been convicted of multiple counts." However, the Commentary does not speak specifically to the situation in which the defendant has been tried and acquitted of conduct for which a sentence enhancement is sought.

The Government recognizes that this is an issue for decision by the Sentencing Commission in the first instance. As stated in the Petition, "We had refrained from seeking this Court's intervention, however, because the Ninth Circuit stated in *Brady* that its rule was based on an interpretation of the Guidelines, *Brady*, 928 F.2d at 852 n. 14, and it therefore appeared to raise an issue for the Sentencing Commission to address under *Braxton v. United States*, 500 U.S. 344, 348-349 (1991). . . . " Pet. 9.

Indeed the Sentencing Commission is very aware of the split in authority created by *United States v. Brady*, 928 F.2d 844 (9th Cir. 1991) and its progeny. For the past several years the Commission has identified the split of authority and has published the conflicting authority in a public document entitled "Ongoing Circuit Conflicts." See Appendix B to this Response.

The Commission has now gone beyond merely identifying the split in authority. On July 2, 1996, the Commission announced its intention to consider modifications to the sentencing guidelines, including the use of "acquitted conduct" as "relevant conduct" for a Guideline sentence enhancement. The announcement appears in the Federal Register at 61 Fed. Reg. 34465.

In 1995, the Commission announced that it was initiating a multi-year project to comprehensively assess and simplify provisions of the Guidelines Manual. See 60 F.R. 49316-17 (Sept. 22, 1995). After considering a number of staff papers and input from interested individuals and groups, the Commission anticipates focusing its attention and possible amendment consideration on the following specific issues:

Relevant Conduct. Priority issues for the 1996-97 amendment cycle include: (1) clarifying/streamlining the relevant conduct guideline assuming no substantive policy changes; and (2) developing options to limit the use of acquitted conduct at sentencing. Issues of lower priority that may be further explored during future amendment cycles include: (1) substantively changing the relevant conduct guideline to limit the extent to which unconvicted conduct can affect the sentence; and (2) increasing the burden of proof at sentencing to a "clear and convincing" standard.

61 Fed. Reg. 34465

Under this announcement acquitted conduct is a "priority issue" for resolution in the 1996-97 amendment cycle. In the normal course of business this should result in a proposed amendment to be presented to the United States Congress by May 1, 1997, for adoption by November 1, 1997. The notes of the Commission meeting of July 1, 1996, include three sets of proposed amendments to address the acquitted conduct issue. Under Option 1, acquitted conduct may be considered to set the Guideline range and to base an upward departure, but only if the

conduct is established independent of evidence introduced at trial. Under Option 2, acquitted conduct may be considered in setting the Guideline range, but only if the sentencing court employs a "clear and convincing" standard of proof rather than the "preponderance of the evidence" standard employed in other sentencing decisions. Under Option 3, acquitted conduct is to be considered using the same standard as other evidence of unconvicted conduct, but with a discretionary downward departure to account for issues of "fundamental fairness."

The Commission, therefore, is addressing the "acquitted conduct" issue which is posed by the Government's Petition for Writ of Certiorari in the present case. The Guideline amendment on acquitted conduct may coincide with or precede any opinion this Court may deliver in the present case, should certiorari be granted.

In *Braxton v. United States*, *supra*, this Court indicated that certiorari should not be granted in such a situation.

"... Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest. This congressional expectation alone might induce us to be more restrained and circumspect in using our certiorari power as the primary means of resolving such conflicts; but there is even further indication that we ought to adopt that course. In addition to the *duty* to review and revise the Guidelines, Congress has granted the Commission the unusual explicit *power* to decide whether and to what extent its amendments

reducing sentences will be given retroactive effect, 28 USC § 994(u). This power has been implemented in USSG § 1B1.10, which sets forth the amendments that justify sentence reduction.

We choose not to resolve the first question presented in the current case, because the Commission has already undertaken a proceeding that will eliminate circuit conflict over the meaning of § 1B1.2. . . .

500 U.S. at 348-349.

The Sentencing Commission is currently addressing the question of whether acquitted conduct may be considered "relevant conduct" under Guideline § 1B1.3. This court should not intervene in a question which is soon to be resolved by Guideline amendment.

B. There Is a Split in Circuit Court Authority on the Acquitted Conduct Issue.

The Government is correct in its observation that there is a split of authority among the circuits, with the majority disagreeing with the position taken by the Ninth Circuit that use of acquitted conduct for sentence enhancement should not be allowed. See authorities cited in footnotes 2, 3, and 5 of Petition. Two caveats must be made to this observation, however.

First, the circuits other than the Ninth, which have adopted the position that acquitted conduct may be used to enhance a Guideline sentence, have not done so uniformly or without misgivings. The Seventh Circuit has observed that acquitted conduct may be considered in sentencing but should not be used as the sole basis for a

sentence enhancement. *United States v. Perez*, 858 F.2d 1272, 1277 (7th Cir. 1988). A panel of the First Circuit has recognized the constitutional implications of permitting such sentence enhancements.

" . . . [W]e believe that a defendant's Fifth and Sixth Amendment right to have a jury determine his guilt beyond a reasonable doubt is trampled when he is imprisoned (for any length of time) on the basis of conduct of which a jury has necessarily acquitted him. Moreover, we believe that the Guidelines' apparent requirement that courts sentence for acquitted conduct utterly lacks the appearance of justice. This panel urges the court to reconsider en banc the issue of acquitted conduct when it is next squarely presented."

United States v. Lanoue, 71 F.3d 966, 984 (1st Cir. 1995).

Second, although some other circuits have addressed constitutional arguments in the course of their opinions, e.g. *United States v. Boney*, 977 F.2d 624, 635 (D.C. Cir. 1992) and *United States v. Rodriguez-Gonzalez*, 899 F.2d 180-182 (2d Cir.), cert. denied, 498 U.S. 844 (1990), the Ninth Circuit has not treated this as a constitutional issue. The Government points to a sentence in *United States v. Putra*, 78 F.3d 1386 (9th Cir.1996), in which the court states, "We note, however, that *Brady* is a judicial limitation on the facts the district court may consider at sentencing, beyond any limitation imposed by the Guidelines. Thus, our application of *Brady* to the circumstances of this case is very narrow." No portion of *Brady* or its progeny cites or relies on any portion of the Constitution. Rather, the Ninth Circuit has chosen to interpret the

Guidelines to forbid the use of acquitted conduct and, beyond that, it has promulgated a judicial rule designed to give the highest collateral effect to a jury's acquittal. The Ninth Circuit has not promulgated a rule of constitutional interpretation. The conflict between circuits pointed to by the Government is at an administrative, not a constitutional, level.

C. A Grant of Certiorari in This Case Would Have Constitutional Implications Beyond Those Suggested by the Government.

Although there is not now a Circuit conflict of constitutional dimensions, a grant of certiorari would automatically trigger a debate on constitutional grounds. This debate would not be as simple as the Government suggests, and would in fact impact other constitutional provisions with results not foreseen in the Government's brief.

1. Double Jeopardy. "[T]he Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *United States v. Halper*, 490 U.S. 435, 440 (1989). Despite this observation, this Court has seldom had occasion to review convictions obtained or punishment imposed following an acquittal on charges involving the same conduct. For one exception, see *Green v. United States*, 355 U.S. 184 (1957), holding that a successful appeal from conviction on a lesser included offense cannot lead to retrial on the greater offense, where the jury in the first trial impliedly

acquitted the defendant of the greater charge by failing to return a verdict on the greater charge.² The present case would apply that prong of the double jeopardy analysis dealing with punishment following an acquittal.

The Government seeks to rely upon this Court's recent decision in *Witte v. United States*, 515 U.S. ___, 132 L.Ed.2d 351, 115 S.Ct. 2199 (1995). The *Witte* decision, arising under the Sentencing Guidelines, was governed by that prong of Double Jeopardy analysis which deals with an attempt to punish criminally a second time for the same offense. 132 L.Ed.2d at 361. Under that prong, conduct for which the defendant has already suffered a Guideline sentence enhancement may be subsequently charged in a separate proceeding leading to a conviction. 132 L.Ed.2d at 365. This Court cautioned that, as a matter of Guideline interpretation, in the second sentencing proceeding the trial court must take into account the previous sentence involving the same conduct. 132 L.Ed.2d at 367. The *Witte* analysis did not deal with acquitted conduct, and did not decide whether acquitted conduct

² *Williams v. New York*, 337 U.S. 241 (1949) cited by the Government at Pet. 10, involved the use in a death penalty prosecution of information of some 30 burglaries committed by the defendant which did not result in conviction. That case did not involve acquitted conduct, and it therefore should not be cited in the present context. The continued validity of *Williams v. New York* is at least questionable in view of this Court's current requirement of "heightened reliability" in the imposition of death judgments. *Darden v. Wainwright*, 447 U.S. 168, 179-183 (1986). This Court has forbidden the relitigation of issues in death penalty proceedings which have previously led to acquittal. *Arizona v. Rumsey*, 467 U.S. 203, 211-212 (1984) and *Bullington v. Missouri*, 451 U.S. 430, 446 (1981).

can ever become "relevant conduct" under the Sentencing Guidelines. Furthermore, the Ninth Circuit in its *Watts* opinion did not consider the *Witte* opinion because the Government failed to bring it up by timely briefing. The application of *Witte* in this context, if any, should not be addressed by this Court until the circuit courts of appeal have had the opportunity to apply it.

Consistent with the Double Jeopardy Clause, a jury acquittal must foreclose any form of prison punishment for the same conduct.

2. Collateral Estoppel. Collateral estoppel is "a part of the Fifth Amendment's guarantee against double jeopardy." *Ashe v. Swenson*, 397 U.S. 436, 442-443 (1970). "The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' [fn.]" 397 U.S. at 443-444.

The careful comparison of the acquitted charge with the proposed sentence enhancement is an essential part of the *Brady* rule. See *United States v. Vgeri*, 51 F.3d 876 (9th Cir. 1995) and *United States v. Diaz-Rosas*, 13 F.3d 1305 (9th Cir.), cert. denied, 114 S.Ct. 1848 (1994), in which drug

quantities were allowed to support sentencing enhancements because not included in the count of acquittal. This aspect of the constitutional guarantee against collateral estoppel should be included in any final resolution of the acquitted conduct issue.

3. Due Process. Use of acquitted conduct also has implications under the Due Process Clause. The integrity of our system of justice cannot be maintained without giving substantial effect and credit to a jury acquittal. To permit the Government to make an "end run" around the jury verdict and obtain the same sentence despite an acquittal would tend to make the jury trial system an irrelevant formality. See the discussion in *United States v. Lombard*, 72 F.3d 170 (1st Cir. 1995), forbidding imposition of a Guideline life term on a firearm offense for a related homicide on which the defendant had already been tried and acquitted in state court. Similar Due Process considerations have led this Court to declare that a prior conviction cannot be used as a sentencing factor when it is demonstrated that the prior conviction was obtained without the assistance of counsel. *United States v. Tucker*, 404 U.S. 443 (1972).

The common law demonstrates a deep respect, even reverence, for the implications of a jury acquittal. Although it is often said that a verdict of not guilty is not a finding of innocence, quite the opposite is true in practice; an acquittal is very often treated as an exoneration, far beyond the restrictions of double jeopardy. See, for example, California Penal Code § 851.8(e), providing that on a judgment of acquittal the trial judge may find the defendant "factually innocent." All law enforcement

agencies are then ordered to seal and destroy all records of the arrest and prosecution.

Under the Due Process Clause of the Fifth Amendment to the United States Constitution the use of acquitted conduct for sentence enhancement must be forbidden.

4. Right to Jury Trial. The primary functions of the right to trial by jury are to prevent oppressive and arbitrary actions by the government and to avoid prosecutorial unfairness. *Duncan v. Louisiana*, 391 U.S. 145, 149-150 (1968). These functions are denigrated by the use of acquitted conduct as a sentencing enhancement. Although sentencing enhancements may be imposed in some situations in the absence of any jury trial, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), once there has been a jury trial and an acquittal the verdict must be respected. To permit imposition of a similar penalty by other means renders the entire jury trial pointless and has an obvious detrimental effect on the jury trial as an institution.

For these reasons, the argument which the Government proposes to unleash has wide constitutional ramifications. The result cannot be confined to the narrow formality proposed by the Government. The sentence enhancement involved in this case must be disallowed in order to protect fundamental rights to due process and jury trial and protection against double jeopardy.

D. The Present Case Is an Awkward and Inappropriate Vehicle for Resolution of the Acquitted Conduct Issue.

Trial was held in this matter in November and December of 1993. The jury was instructed under the then-current definition of firearm use under 18 U.S.C. § 924(c), which required only that the firearm was within the possession or control of the defendant and available to him thus emboldening him to commit the underlying offense. See *United States v. Torres-Rodriguez*, 930 F.2d 1375, 1385 (9th Cir. 1991). On December 6, 1995, this Court rendered its decision in *Bailey v. United States*, 116 S.Ct. 501. *Bailey* established a new standard for prosecutions under § 924(c). Under *Bailey* the defendant must be found to have "carried" or "actively employed" the firearm in the course of the offense in order to be subject to conviction under § 924(c).

The dangerous weapon enhancement Guideline, § 2D1.1(b)(1), requires only that the weapon was possessed, "unless it is clearly improbable that the weapon was connected with the offense." Commentary, Application Note 3. The Guideline language applied by the sentencing court in the present case was similar to the language of the jury instruction under which Mr. Watts was acquitted. Thus there is roughly parallel language for the constitutional analysis, should this Court undertake it. However the pre-*Bailey* language will not be read in future trials. Therefore, certiorari should not be granted because the resulting decision would create confusion for lower courts, which are now operating in the post-*Bailey* era. What effect should be given to a § 924(c) acquittal in the post-*Bailey* era? The conduct defined in a post-*Bailey*

prosecution (use) is much narrower than the conduct proscribed by the Guideline (mere possession). Therefore, courts in the future would not find guidance from this case when faced with an acquittal under the new definition for firearm use.

For this reason as well, this Court should deny certiorari.

CONCLUSION

This is an issue for decision in the first instance by the United States Sentencing Commission. When the Commission has completed its revision of the Guideline there may be no further conflict between the Circuits and no latent constitutional issues. For all of the reasons stated the Petition for Certiorari should be denied.

Respectfully submitted.

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APPENDIX A
U.S. Constitution
AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution
AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 924 (1993 version)

* * *

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C.App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and -

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

B1

APPENDIX B

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ONGOING CIRCUIT CONFLICTS

Prepared by
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May 2, 1994

Disclaimer: Information provided by the Commission's Legal Staff is offered to assist in understanding and applying the sentencing guidelines. The information does not necessarily represent the official position of the Commission and should not be considered a definitive statement of the law.

Note: Case citations do not include information regarding denial of certiorari.

ONGOING CIRCUIT CONFLICTS -- PART I

The following circuit conflicts involve conflicts regarding guideline interpretation and could be resolved directly by amendment of the guidelines.

GUIDELINE ISSUE	CIRCUIT DECISION YES	CIRCUIT DECISION NO
<p>§1B1.3 (Acquitted Conduct and Relevant Conduct)</p> <p>Whether relevant conduct may include acquitted conduct.</p> <p>(See proposed amendment 18, considered by Commission in 1994 cycle.)</p>	<p>First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, D.C.</p> <p><u>United States v. Moccia</u>, 891 F.2d 13 (1st Cir. 1989)</p> <p><u>United States v. Rodriguez-Gonzalez</u>, 899 F.2d 177, 180-81 (2d Cir. 1990)</p> <p><u>United States v. Isom</u>, 886 F.2d 736, 738-39 (4th Cir. 1989)</p> <p><u>United States v. Juarez-Ortega</u>, 866 F.2d 747, 748-49 (5th Cir. 1989)</p> <p><u>United States v. Duncan</u>, 918 F.2d 647, 652 (6th Cir. 1990)</p> <p><u>United States v. Masters</u>, 978 F.2d 281, 285-86 (7th Cir. 1992) ("implicit" acquitted conduct)</p> <p><u>United States v. Dawn</u>, 897 F.2d 1444 (8th Cir. 1990)</p> <p><u>United States v. Coleman</u>, 947 F.2d 1424, 1429 (10th Cir. 1991)</p> <p><u>United States v. Rivera-Lopez</u>, 928 F.2d 372 (11th Cir. 1991) (<u>per curiam</u>)</p> <p><u>United States v. Boney</u>, 977 F.2d 624 (D.C. Cir. 1992)</p>	<p>Ninth</p> <p><u>United States v. Pinckney</u>, 15 F.3d 825 (9th Cir. 1994) (acquitted conduct may not be used to determine relevant conduct; adopts "core rationale" of <u>Brady</u>, i.e., to do otherwise would "pervert our system of justice") but see <u>United States v. Diaz-Rosas</u>, 13 F.3d 1305 (9th Cir. 1994) (<u>per curiam</u>) (cocaine that defendant was acquitted of possessing may be included if it was conduct of others in conspiracy for which defendant is accountable)</p>
<p>§1B1.3; §5K2.0 (Acquitted Conduct and Upward Departure)</p> <p>Whether an upward departure may include acquitted conduct.</p> <p>(See proposed amendment 18, considered in 1994 cycle.)</p>	<p>Third, Seventh, Tenth</p> <p><u>United States v. Ryan</u>, 866 F.2d 604, 608-09 (3rd Cir. 1989)</p> <p><u>United States v. Fonner</u>, 920 F.2d 1330, 1332-33 (7th Cir. 1990)</p> <p><u>United States v. Kelly</u>, 1 F.3d 1137, 1141 n.3 (10th Cir. 1993)</p>	<p>Ninth</p> <p><u>United States v. Brady</u>, 928 F.2d 844, 851 (9th Cir. 1990) (guidelines preclude use of acquitted conduct as basis of upward departure; to do so would "pervert our system of justice")</p>